

THE LAW OF NAVAL WARFARE AT THE TURN OF TWO CENTURIES

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I. INTRODUCTION

The law of naval warfare as it existed in 1899 and as it is understood in 1999 exhibits a few similarities but many differences. The fundamental similarity is that the law of naval warfare can be seen, then as now, as consisting primarily of customary international law. The many differences in this law have been caused by the major changes in war at sea and the law of the sea. In 1899 war at sea meant combat primarily by gunfire between surface warships, control of maritime commerce, and shore bombardment. Today, war at sea also involves nuclear-powered aircraft carriers; supersonic aircraft, helicopters and tilt-rotor aircraft; submarines; high-speed patrol craft; ballistic, cruise, and other guided missiles; long-range secure communications for command, control, computers, intelligence, surveillance, and reconnaissance; radar; underwater sound technology; electronic and information warfare; satellites in space; unmanned aerial and undersea vehicles; and stealth and computer technology; as well as expeditionary and amphibious capabilities.¹ Nevertheless, the fundamental role of navies continues to be to establish control at sea or to deny it to the enemy, linking that control to broad political and economic issues ashore.² In view of these constants and changes, this article reviews the state of the law of naval warfare at the end of the nineteenth and twentieth centuries and assesses its future prospects.

The most recent, comprehensive international document articulating the modern law of naval warfare is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, prepared under the auspices of the International Institute of Humanitarian Law,³ to which frequent reference will be made below.⁴ More recently, the International Law Association

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¹ See John B. Hattendorf, *Sea Warfare*, in THE OXFORD ILLUSTRATED HISTORY OF MODERN WAR 213, 223–27 (Charles Townshend ed., 1997); MARTIN VAN CREVELD, TECHNOLOGY AND WAR FROM 2000 B.C. TO THE PRESENT 199–216, 266–83 (1989); JOHN KEEGAN, THE PRICE OF ADMIRALTY: THE EVOLUTION OF NAVAL WARFARE (1988).

² Hattendorf, *supra* note 1, at 227.

³ SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]; see Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AJIL 192 (1995); Horace B. Robertson, *An International Manual for the Law of Armed Conflict at Sea*, DUKE L. MAG., Winter 1995, at 14. Between 1987 and 1994, the author participated, in his personal capacity, in the development of the *San Remo Manual*. The *Manual* also contains an extensive "commentary explaining the legal background to the provisions and the discussions of the participants where there was a certain controversy as to the state of the law." Doswald-Beck, *supra*, at 193. The commentary is denominated the "Explanation" and is so termed in this article. The text of the *San Remo Manual* (without the Explanation) also appears in INT'L REV. RED CROSS, NO. 309, Nov.–Dec. 1995, at 595.

⁴ In addition to the *travaux préparatoires* of the *San Remo Manual* listed in Doswald-Beck, *supra* note 3, at 194–95 n.12, see William J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 1991 CAN. Y.B. INT'L L. 238; Wolff Heinschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, the Traditional Law*, *id.* at 283; Horace B. Robertson, *The "New" Law of the Sea and the Law of Armed Conflict at Sea*, in U.S. NAVAL WAR COLLEGE, READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978–1994, at 263 (International Law Studies No. 68, John Norton Moore & Robert F. Turner eds., 1995); and Louise Doswald-Beck, *Vessels, Aircraft and Persons Entitled to Protection During Armed Conflicts at Sea*, 1994 BRIT. Y.B. INT'L L. 211.

adopted the more narrowly focused Helsinki Principles on the Law of Maritime Neutrality,⁵ which are consistent with the corresponding provisions of the *San Remo Manual*.

The only treaty applicable to war at sea in 1899 was the Convention for the Adaptation to Maritime Warfare of the Principles of the 1864 Geneva Convention, adopted by the first Hague Peace Conference.⁶ Of the seven treaties relating to naval operations adopted by the second Hague Peace Conference in 1907, only Convention (No. VIII) Relative to the Laying of Automatic Submarine Contact Mines,⁷ and portions of Nos. XI and XIII, respectively concerning certain restrictions regarding the exercise of the right of capture in naval war⁸ and the rights and duties of neutral powers in naval war,⁹ have continuing significance. The Second Geneva Convention of 1949 for the protection of the wounded, sick, and shipwrecked,¹⁰ as supplemented by a few provisions of the 1977 First Additional Protocol to the 1949 Geneva Conventions,¹¹ constitutes the set of treaty-based rules that actually govern the conduct of war at sea today.¹² There is still no comprehensive treaty governing naval warfare.

Also in 1899, a few instruments, not of a legally binding nature, could be referred to for guidance. The 1868 Geneva Conference had adopted additional articles so that the protections of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field would be extended to naval forces.¹³ These articles were acceded to by the United States in 1882¹⁴ but never entered into force (although Spain and the United States agreed to apply them during the war of 1898¹⁵). Earlier, in 1856, in conjunction with the conclusion of the Treaty of Peace that ended the Crimean War (1853–1856), the plenipotentiaries signed the Declaration Respecting Maritime Law, which abolished privateering and provided that the neutral flag covers enemy goods, with the exception of contraband of war; that neutral goods, except contraband, are not subject to capture under the enemy's flag; and that blockades must be effective in preventing access to the enemy's coast if they are to be legal and binding.¹⁶

The customary rules of prize law were set out in the 1909 London Declaration concerning the Laws of Naval War.¹⁷ Although it never entered into force, its rules were recognized by

⁵ Helsinki Principles on the Law of Maritime Neutrality, in 68 INTERNATIONAL LAW ASSOCIATION, CONFERENCE REPORT 497 (1998) [hereinafter Helsinki Principles]. The final report of the ILA Committee on Maritime Neutrality, which prepared the Helsinki Principles, also contains commentaries on each of the principles. *Id.*

⁶ Convention [No. III] for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263.

⁷ Convention [No. VIII] Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, 1 Bevans 669 [hereinafter Hague Convention No. VIII]. See *Corfu Channel case* (UK v. Alb.), 1949 ICJ REP. 4, 22 (Apr. 9); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 112 (June 27).

⁸ Convention [No. XI] Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, 1 Bevans 711 [hereinafter Hague Convention No. XI].

⁹ Convention [No. XIII] concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723.

¹⁰ Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85 [hereinafter Geneva Convention No. II].

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 UNTS 3, reprinted in 16 ILM 1391 (1977) [hereinafter Additional Protocol I].

¹² The effectiveness of the London Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 LNTS 353, 3 Bevans 298 [hereinafter London Protocol], which is still technically in force, is discussed in the text at notes 51–56 *infra*.

¹³ Additional Articles Relating to the Condition of the Wounded in War, Oct. 20, 1868, 22 Stat. 946 [hereinafter Additional Articles], reprinted in THE LAWS OF ARMED CONFLICTS 285 (Dietrich Schindler & Jiří Toman eds., 3d rev. ed. 1988) [hereinafter ARMED CONFLICTS].

¹⁴ See 22 Stat. 946.

¹⁵ See 1898 FOREIGN RELATIONS OF THE UNITED STATES 1148–59.

¹⁶ Declaration Respecting Maritime Law, Apr. 16, 1856, reprinted in 1 AJIL Supp. 89 (1907), ARMED CONFLICTS, *supra* note 13, at 787.

¹⁷ Declaration concerning the Laws of Naval War, Feb. 26, 1909, reprinted in 3 AJIL 179 (1909), ARMED CONFLICTS, *supra* note 13, at 845 [hereinafter London Declaration].

several belligerents during World War I.¹⁸ In 1913 the Institute of International Law adopted a more comprehensive compilation of the law of naval warfare entitled *The Law of Naval War Governing the Relations between Belligerents*, but popularly known as the "Oxford Manual of Naval War."¹⁹

The U.S. Navy first published a manual on the law of naval warfare in 1900, and it remained in effect until 1904.²⁰ Following the entry of the United States into World War I on April 6, 1917, the Secretary of the Navy issued *Instructions for the Navy of the United States Governing Maritime Warfare*.²¹ These were replaced in early 1941 by the *Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare*.²² Because of the changes in state practice during World War II, the U.S. Navy published a new manual in 1955, *The Law of Naval Warfare*.²³ After the adoption of the United Nations Convention on the Law of the Sea in 1982, the navy revised and updated that manual under the title *The Commander's Handbook on the Law of Naval Operations*²⁴ and also issued an *Annotated Supplement* thereto,²⁵ both of which have subsequently been revised.²⁶ The German,²⁷ Canadian²⁸ and Australian²⁹ governments have published similar manuals. Other national military manuals give less-detailed treatment to the law of naval warfare.³⁰ As mentioned, the *San Remo Manual* sets forth

¹⁸ See ARMED CONFLICTS, *supra* note 13, at 843.

¹⁹ Aug. 9, 1913, *reprinted in id.* at 857.

²⁰ U.S. NAVY DEP'T, THE UNITED STATES NAVAL WAR CODE OF 1900: THE LAWS AND USAGES OF WAR AT SEA (General Orders No. 551, June 27, 1900), revoked by General Orders No. 150, Feb. 4, 1904, *reprinted in* 3 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS, 1903, at 101 (1904). The code was revoked,

not because of any change of views as to the rules which it contained, but because many of those rules, being imposed upon the forces of the United States by the order, would have put our naval forces at a disadvantage as against the forces of other powers, upon whom the rules were not binding.

Maritime War, 6 Hackworth, DIGEST §591, at 437 (quoting the instructions to the American delegation to the second Hague Peace Conference).

²¹ U.S. NAVY DEP'T, INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME WARFARE, JUNE 1917 (1918).

²² U.S. NAVY DEP'T, TENTATIVE INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME AND AERIAL WARFARE, FEBRUARY 1941, *replaced by* the INSTRUCTIONS issued May 7, 1941 (1941), *reprinted* April 1944 with changes issued to date.

²³ OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF THE NAVY, LAW OF NAVAL WARFARE (Naval Warfare Pub. No. NWIP 10-2, 1955), *reprinted in* U.S. NAVAL WAR COLLEGE, THE LAW OF WAR AND NEUTRALITY AT SEA 359 (International Law Studies No. 60, Robert W. Tucker ed., 1957).

²⁴ OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Naval Warfare Pub. No. NWP 9, 1987). Work on this manual began while the author was assigned to the International Law Division, Office of the Judge Advocate General of the Navy, 1979-1983. NWP 9 was translated into Spanish by the Argentine Naval War College and into Japanese by the Japanese Maritime Self-Defense Force Staff College. See J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 505 & n.12 (2d ed. 1996).

²⁵ OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. DEP'T OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1989). The author drafted the *Annotated Supplement* while assigned to the faculty of the Naval War College in 1986-1988 and completed it after being assigned to the Department of State.

²⁶ OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Naval Warfare Pub. No. NWP 9 (Rev. A)/FMFM 1-10, 1989) [hereinafter COMMANDER'S HANDBOOK NWP 9], *reprinted in* U.S. NAVAL WAR COLLEGE, THE LAW OF NAVAL OPERATIONS 385 (International Law Studies No. 64, Horace W. Robertson ed., 1991) [hereinafter THE LAW OF NAVAL OPERATIONS]; OFFICE OF THE CHIEF OF NAVAL OPERATIONS AND HEADQUARTERS, U.S. MARINE CORPS, U.S. DEP'T OF THE NAVY, U.S. COAST GUARD & U.S. DEP'T OF TRANSPORTATION, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Naval Warfare Pub. No. NWP 1-14M (formerly NWP 9 (Rev. A))/MCWP 5-2.1/COMDTPUB P5800.7, 1995) [hereinafter COMMANDER'S HANDBOOK NWP 1-14M]. The second edition of the *Annotated Supplement* was published by the U.S. Naval War College in 1997 [hereinafter ANNOTATED SUPPLEMENT].

²⁷ FRG FEDERAL MINISTRY OF DEFENSE, HUMANITARIAN LAW IN ARMED CONFLICTS-MANUAL (ZDv 15/2, 1992) (Eng. version); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., 1995).

²⁸ CANADIAN DEP'T OF NATIONAL DEFENCE, HANDBOOK ON THE LAW OF NAVAL OPERATIONS (MAOP-331, 1991), which adopts COMMANDER'S HANDBOOK NWP 9, *supra* note 26, as the interim Canadian manual with certain differences owing principally to differing treaty obligations.

²⁹ AUSTRALIAN DEP'T OF DEFENCE, MANUAL OF THE LAW OF THE SEA (ABR 5179, 1983).

³⁰ See the listing in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 27, App. 3.

the most recent, and the most comprehensive, enunciation of the international law applicable to armed conflicts at sea.

The manuals published in the last decade of the twentieth century take into account the new technologies and modern means and methods of naval warfare, and adapt the modern law of land warfare to today's conditions at sea. For example, the latest edition of the U.S. Navy's manual addresses controlled naval mines (which have no destructive capability until deliberately activated), cluster and fragmentation weapons, directed-energy devices (such as lasers) and over-the-horizon weapons systems (such as cruise missiles).³¹ Further, these manuals reflect the fundamental changes crystallized by the adoption of the UN Charter, which permit nations to resort to the use of force only in self-defense or when authorized by the Security Council or through a regional arrangement or agency.³²

II. AREAS OF NAVAL WARFARE

A century ago, international law recognized only two jurisdictional zones at sea: a narrow territorial sea, adjacent to the shoreline, of no more than 3 nautical miles in breadth, which was under the sovereignty of the coastal state; and the high seas, extending seaward from the outer limit of the territorial sea, which were open to all but subject to the duty of each user to respect the rights of the others. Consequently, belligerent naval operations were permitted anywhere at sea except within neutral territorial seas.

In the decades after World War II, marine areas subject to coastal state sovereignty greatly expanded in breadth. Not only did the acceptable breadth of the territorial sea grow to 12 nautical miles,³³ which increased the number of international straits with overlapping territorial seas, but also a new concept of archipelagic waters was recognized by international law. Today, waters enclosed by archipelagic straight baselines connecting the outermost islands and drying reefs, as well as the adjacent territorial sea, of island states that meet the specified requirements fall under the sovereignty of the archipelagic state.³⁴ As a result, the area of potentially neutral waters where belligerent naval operations would normally be prohibited has multiplied.

Moreover, international recognition of the exclusive economic zone (EEZ) and the continental shelf³⁵ now requires belligerents to have due regard for the rights of coastal states in those zones when conducting hostilities in sea areas between the territorial sea and the high seas and on the continental shelf.³⁶ In addition, inspired by another provision of the Law of the Sea Convention,³⁷ the *San Remo Manual* encourages parties to the conflict to agree that no hostile actions will be conducted in marine areas containing rare or fragile ecosystems, or the habitat of depleted, threatened, or endangered species or other forms of marine life.³⁸

Hague Convention No. XIII spelled out the traditional rules concerning the rights and duties of neutrals during naval war, developed, as noted above, during the time of the 3-mile territorial sea and broad high seas. The modern naval manuals have adapted the Hague

³¹ COMMANDER'S HANDBOOK NWP 1-14M, *supra* note 26, paras. 9.2, 9.5, 9.8, 9.9, at 9-2-9-5.

³² UN CHARTER Arts. 2(4), 51, 53.

³³ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 3, 1833 UNTS 397, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) [hereinafter LOS Convention]. As the U.S. Navy has pointed out, "extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters." COMMANDER'S HANDBOOK NWP 1-14M, *supra* note 26, para. 7.3.4.1, at 7-3.

³⁴ LOS Convention, *supra* note 33, Arts. 46, 47, 49.

³⁵ *Id.*, Parts V and VI.

³⁶ See SAN REMO MANUAL, *supra* note 3, para. 10; *accord* Helsinki Principles, *supra* note 5, para. 4. The COMMANDER'S HANDBOOK NWP 1-14M, *supra* note 26, does not address this situation.

³⁷ LOS Convention, *supra* note 33, Art. 194(5).

³⁸ SAN REMO MANUAL, *supra* note 3, para. 11.

rules to the new maritime zones, and the rules as to both neutrals and belligerents are now articulated in part II of the *San Remo Manual*. Specific rules are separately detailed in the *Manual* for sovereign waters (i.e., internal waters, territorial sea, and archipelagic waters), international straits and archipelagic sea-lanes (distinguishing between transit and archipelagic sea-lanes passage and innocent passage), the EEZ and continental shelf, and the high seas and seabed beyond national jurisdiction.³⁹

In adapting these rules, an operative standard for belligerents in carrying out their duties at sea toward neutrals had to be adopted: should it be “due regard” or “respect” for the rights of neutrals? Review of the relevant treaties revealed that “due regard” and not “respect” was the standard used in the law of the sea, while the reverse held true for the law of war.⁴⁰ Because these rules involve balancing the rights and duties of both neutrals and belligerents at sea, the “due regard” standard from the law of the sea was adopted. An obligation to “respect” the rights of neutrals was rejected as too onerous because it implied an absolute and affirmative duty, which is inconsistent with the approach of the law of the sea and the necessities of naval warfare.⁴¹ Hence, the *San Remo Manual* provides: “In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.”⁴²

³⁹ The Helsinki Principles, *supra* note 5, para. 5.2.9, while consistent with the *San Remo Manual*'s provisions, are less detailed.

⁴⁰ Compare entries in the index to UNITED NATIONS, *supra* note 33, with INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), INDEX OF INTERNATIONAL HUMANITARIAN LAW (Waldemar A. Solf & J. Ashley Roach eds., 1987).

⁴¹ See Explanation, *supra* note 3, para. 12.2; accord Helsinki Principles, *supra* note 5, para. 3.1. There is general agreement among scholars that the “due regard” formula in the law of the sea necessarily reflects the need to accommodate the rights and duties of all users of the oceans. For example, Professor D. P. O'Connell wrote:

One common thread running through the formulation of the various jurisdictional zones in the contemporary law of the sea is the idea of accommodation of interests, or a balancing of rights and duties, which can be summed up in the concept of “reasonable use”. The result is that there is little absolutism in the rights of States with respect to the sea.

1 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 57 (I. A. Shearer ed., 1982).

McDougal and Burke described the common interest in a balance of exclusive and inclusive uses of the oceans:

The common interest of all states and their peoples in both exclusive and inclusive uses of the oceans of the world and in an economic accommodation of all uses is not . . . difficult to demonstrate. . . . [A]ll states which border upon the oceans have a common interest in those traditional exclusive assertions of control in nearby areas which permit a state both to protect its territorial base and organized social life from too easy invasion or attack from the sea and to take advantage of any unique proximity it may have to the riches of the sea bed and marine life. . . . [E]ach state, whether coastal or not, has an interest in the fullest possible access, either for itself or for others on its behalf, to all the inclusive uses of the ocean . . . for the richest possible production of values. From this mutual interest of all states in all types of uses, it follows that each state has an interest in an accommodation of such uses, when they conflict, which will yield both an adequate protection to exclusive claims and yet the greatest possible access to inclusive uses. The net total of inclusive uses available for sharing among all states is directly dependent, further, upon the restriction of exclusive claims to the minimum reasonably necessary to the protection of common interest. If all states asserted and were protected in extravagant, disproportionate, exclusive claims, there would be little, if any, net total of inclusive use for common enjoyment. . . . [T]he common interest is in an accommodation of exclusive and inclusive claim which will produce the largest total output of community values at the least cost.

MYRES S. MCDUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS 51–52 (1962).

On the other hand, when considering obligations of behavior, the term “respect” is used in the law of armed conflict to mean that armed force should not be directed against protected persons or objects. “Respect” is used in common Article 1 of the 1949 Geneva Conventions in the sense of the duty of states parties to perform their obligations under a treaty in good faith. See ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 35, para. 39 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). In his *Commentary* on Article 12 of the Second Geneva Convention, Pictet defined “respect” as “to spare, not to attack . . . ; in a more positive sense, it comprises even such actions as is necessary to ensure respect.” GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA: COMMENTARY 89–90 (Jean Pictet ed., 1960). The ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra*, at 146, para. 446, applies the same definition.

⁴² SAN REMO MANUAL, *supra* note 3, para. 12. *Id.*, para. 13(d), defines the term “neutral” as “any State not party to the conflict.” This definition is not conditioned on adherence by the neutral to the traditional duties of neutrals. The Explanation notes that a neutral runs the risk of being treated as a belligerent if it gives more aid to one belligerent than its enemy is prepared to tolerate. Explanation, *supra* note 3, para. 13.14.

III. THE CONDUCT OF HOSTILITIES

No treaty rules specifically make the general principles of the law of war on land applicable to war at sea. Nevertheless, there seems to be general agreement that such principles as the requirements of distinction, definition of military objectives, and precautions in attack should be applied, as is evidenced by the various military manuals, the *San Remo Manual* and the Helsinki Principles.⁴³

Environmental Protection

Concern for the protection of the environment in wartime has emerged only recently. In addition to the hortatory provision regarding certain ecosystems and endangered species,⁴⁴ the *San Remo Manual* states the following: "Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited."⁴⁵ The U.S. Navy's guidance to military commanders is more detailed:

It is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.⁴⁶

Enemy Vessels Exempt from Attack

The Hague Conventions did not address which vessels were exempt from attack. A century later, the *San Remo Manual* lists ten classes of enemy vessels as exempt from attack, including a new category, vessels designed or adapted exclusively to respond to pollution incidents in the marine environment.⁴⁷ Recognizing that today many scientific missions have a military purpose,⁴⁸ the *Manual* exempts only those vessels engaged in nonmilitary scientific activities.⁴⁹ The *Manual* specifies both the conditions of exemption and the circumstances under which it may be lost.⁵⁰ These provisions reflect developments in customary law during this century.

⁴³ SAN REMO MANUAL, *supra* note 3, pt. III, §§1, 2; Helsinki Principles, *supra* note 5, para 5.1.3. The Hague Convention [No. IX] concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681 [hereinafter Hague Convention No. IX], established the general rules of naval bombardment of land targets, which have been further developed by state practice. See COMMANDER'S HANDBOOK NWP 1-14M, *supra* note 26, para. 8.5.1.

⁴⁴ See SAN REMO MANUAL, *supra* note 3, para. 11.

⁴⁵ *Id.*, para. 44.

⁴⁶ COMMANDER'S HANDBOOK NWP 1-14M, *supra* note 26, para. 8.1.3, at 8-2. See J. Ashley Roach, *The Laws of War and the Protection of the Environment*, 1 ENV'T & SECURITY 53 (1997); U.S. NAVAL WAR COLLEGE, PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (International Law Studies No. 69, Richard J. Grunawalt, John E. King & Ronald S. McClain eds., 1996); *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, INT'L REV. RED CROSS, NO. 311, Mar.-Apr. 1996, at 231.

⁴⁷ SAN REMO MANUAL, *supra* note 3, para. 47(h); see Explanation, *supra* note 3, para. 47.52.

⁴⁸ See ROACH & SMITH, *supra* note 24, at 427, 448-49 (military surveys).

⁴⁹ SAN REMO MANUAL, *supra* note 3, para. 47.

⁵⁰ *Id.*, paras. 48-58.

Enemy Merchant Vessels

Prior to World War II, both customary and conventional international law prohibited the destruction of enemy merchant vessels unless the safety of passengers and crew was first assured. This requirement, set out in the 1936 London Protocol, did not apply if the merchant vessel engaged in active resistance to capture or refused to stop when ordered to do so.⁵¹ During World War II, the practice of using surface warships and submarines to attack and sink enemy merchant vessels without prior warning or first providing for the safety of passengers and crew was widespread on both sides. Rationales for these apparent departures from the agreed rules varied. Initially, they were justified as reprisals against illegal acts of the enemy. As the war progressed, however, the belligerents regularly armed merchant vessels and deployed them in convoys, where they collected intelligence and were otherwise incorporated directly or indirectly into the enemy's war-fighting or war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.⁵²

The U.S. view is that although the rules of the 1936 London Protocol continue to apply, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the practice of belligerents during and since World War II.⁵³ The modern rules permit attacks on enemy merchant ships only if they are military objectives. The *San Remo Manual*, building on state practice, lists the activities that may render enemy merchant vessels military objectives and liable to attack.⁵⁴ They include those listed in the 1936 London Protocol, as well as those mentioned above that occurred during World War II. The most controversial activities involved application of the U.S. Navy's standard of "integration into the enemy's war-fighting/war-sustaining effort."⁵⁵ As many felt this standard was too broad, the *Manual* adopted the more general description "otherwise making an effective contribution to military action, e.g., carrying military materials."⁵⁶ In any event, it remains the rule that enemy merchant ships may not be attacked just because they fly the enemy flag.

Neutral Merchant Vessels

Here also the Hague Conventions offered little guidance to contemporary belligerents. The six rules developed in the *San Remo Manual* reflect modern state practice and the realities of maritime commerce and war at sea.⁵⁷ But they do not go so far as to permit attacks on neutral ships carrying exports by the adverse party that might be vital for financing the war effort because, in the words of the Explanation, "the connection between the

⁵¹ London Protocol, *supra* note 12.

⁵² See the collection of essays in U.S. NAVAL WAR COLLEGE, *THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING* (International Law Studies No. 65, Richard J. Grunawalt ed., 1993) [hereinafter *TARGETING ENEMY MERCHANT SHIPPING*].

⁵³ See *COMMANDER'S HANDBOOK NWP 1-14M*, *supra* note 26, para. 8.2.2.2, at 8-4.

⁵⁴ *SAN REMO MANUAL*, *supra* note 3, para. 60.

⁵⁵ *COMMANDER'S HANDBOOK NWP 1-14M*, *supra* note 26, para. 8.2.2.2.7, at 8-3, permits attacking enemy merchantships, inter alia, "[i]f integrated into the enemy's war-fighting/war-sustaining effort and compliance with the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment."

⁵⁶ *SAN REMO MANUAL*, *supra* note 3, para. 60(g).

⁵⁷ *Id.*, para. 67; accord *Helsinki Principles*, *supra* note 5, para. 5.1.2.

exports and military action would be too remote.”⁵⁸ This author expressed a contrary view in the context of the Iran-Iraq “tanker war.”⁵⁹

Means of Warfare

The Hague Conventions did not deal with missiles and other projectiles (except in the context of naval shore bombardment⁶⁰). Convention No. VIII addressed two weapons described in modern terminology as torpedoes and naval mines.⁶¹ Those rules remain applicable today. However, the rules regulating the locations where mines may be laid have been developed, beyond the broad prohibition contained in Article 2 of Hague Convention No. XIII, as a consequence of the international acceptance of new and broader maritime zones. Section 1 of part IV of the *San Remo Manual* reflects those developments, including by prohibiting the mining of international straits that would impede the exercise of the right of transit passage where no safe and convenient alternative routes are provided.⁶²

Methods of Warfare

At the turn of the nineteenth century, the 1856 Paris Declaration Respecting Maritime Law and the 1909 London Declaration sought to regulate blockade. As those rules for the most part have stood the test of time, the *San Remo Manual* adopts them, though it makes some improvements.⁶³ For example, the enforcement of blockades is no longer limited to surface ships lying just off the coast.⁶⁴ Further, starvation of the civilian population can no longer be the sole purpose of a blockade.⁶⁵ Where the effect of the blockade is to induce starvation of the civilian population, the blockading side is now obligated, subject to certain qualifications, to allow relief shipments to reach the coasts of the targeted belligerent.⁶⁶ As detailed in the *San Remo Manual*, these conditions include permitting the blockading side to prescribe the technical arrangements (including search) under which such passage may be effected and requiring it to allow the distribution of the supplies to be made under the local supervision of a protecting power or a humanitarian organization such as the ICRC.⁶⁷

Parties to many twentieth-century conflicts have sought to constrain the movement of ships by establishing special zones, variously termed “war zones,” “operational areas,” “exclusion zones” and “military areas.” Ships transiting the zones have often been subject to attack on sight. Moreover, the large size of some zones and the claimed rights to attack ships found in them have provoked controversy. Nevertheless, not a single treaty on the law of naval war-

⁵⁸ Explanation, *supra* note 3, para. 67.27. The Helsinki Principles, *supra* note 5, para. 5.2.5, provide that goods with a neutral destination coming from a belligerent port do not constitute contraband. The commentary to this paragraph states that the fact that the belligerent may derive revenue from the sale of exported goods does not make them liable to seizure and condemnation as prize or, this author might add, attack and destruction. The U.S. Navy’s ANNOTATED SUPPLEMENT, *supra* note 26, at 8-3 n.11, states that the question of “[a]ttacks on war-sustaining cargo carried in neutral bottoms at sea, such as by Iraq on the tankers carrying oil exported by Iran during the Iran-Iraq war, is not firmly settled.”

⁵⁹ J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War*, 31 VA.J. INT’L L. 593, 607 (1991).

⁶⁰ See Hague Convention No. IX, *supra* note 43.

⁶¹ Hague Convention No. VIII, *supra* note 7. See generally HOWARD S. LEVIE, MINE WARFARE AT SEA (1991).

⁶² SAN REMO MANUAL, *supra* note 3, para. 89. Removal by a neutral state of naval mines unlawfully laid is not an unneutral act. *Id.*, para. 92; Helsinki Principles, *supra* note 5, para. 6.2.

⁶³ SAN REMO MANUAL, *supra* note 3, paras. 92–104. The provisions of the Helsinki Principles, *supra* note 5, para. 5.2.10, are much less detailed.

⁶⁴ SAN REMO MANUAL, *supra* note 3, para. 97.

⁶⁵ *Id.*, para. 102(a); accord Helsinki Principles, *supra* note 5, para. 5.3.

⁶⁶ See Explanation, *supra* note 3, para. 102.3; SAN REMO MANUAL, *supra* note 3, para. 103.

⁶⁷ SAN REMO MANUAL, *supra* note 3, para. 103(a), (b).

fare deals with such zones. The *San Remo Manual* presents several useful rules that, while neither forbidding the establishment of zones per se nor precluding the legitimate uses of the sea areas within them, well balance the competing interests, and thus should constrain the most questionable of the practices that occurred during World Wars I and II and the Iran-Iraq tanker war:⁶⁸

105. A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.
106. Should a belligerent, as an exceptional measure, establish such a zone:
 - (a) the same body of law applies both inside and outside the zone;
 - (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
 - (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
 - (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
 - (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
 - (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; *and*
 - (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.
107. Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.
108. Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.⁶⁹

The Helsinki Principles on the Law of Maritime Neutrality correctly emphasize that creation of a special zone “cannot confer upon a belligerent the right to attack neutral shipping merely on account of its presence in the zone.”⁷⁰

The treaty law in force at the turn of the last century did not address the use of ruses at sea, notwithstanding their long history.⁷¹ The *San Remo Manual* adapts⁷² the relevant provisions of the First Additional Protocol to the 1949 Geneva Conventions, which prohibit perfidy but not such ruses as the use of camouflage, mock operations, and misinformation.⁷³

⁶⁸ For detailed examinations of this subject, see William J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 1986 CAN. Y.B. INT'L L. 91; and L. F. E. Goldie, *Maritime War Zones and Exclusion Zones*, in THE LAW OF NAVAL OPERATIONS, *supra* note 26, at 156. See also George P. Politakis, *Waging War at Sea: The Legality of War Zones*, 38 NETH. INT'L L. REV. 125 (1991); Frank Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law*, 19 OCEAN DEV. & INT'L L. 381, 389–92, 396 (1988); Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INT'L & COMP. L.Q. 629 (1988).

⁶⁹ SAN REMO MANUAL, *supra* note 3, paras. 105–11.

⁷⁰ Helsinki Principles, *supra* note 5, para. 3.3; accord COMMANDER'S HANDBOOK NWP 1–14M, *supra* note 26, para. 7.9, at 7-14 (“In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.”).

⁷¹ Ruses and perfidy were addressed in Article 15 of the Oxford Manual of 1913, *supra* note 19. Paragraph 111 of the *San Remo Manual* restates these provisions. The Explanation, *supra* note 3, para. 111.2, notes that the drafters of the *Manual* were of the view that “the former British practice of Q-ships [warships disguised as merchant ships] is no longer acceptable.” See TONY BRIDGLAND, SEA KILLERS IN DISGUISE: THE STORY OF Q-SHIPS AND DECOY SHIPS IN THE FIRST WORLD WAR (1999); KENNETH M. BEYER, Q-SHIPS VERSUS U-BOATS: AMERICA'S SECRET PROJECT (1999).

⁷² SAN REMO MANUAL, *supra* note 3, paras. 109–11.

⁷³ Additional Protocol I, *supra* note 11, Art. 37.

IV. MEASURES SHORT OF ATTACK

Determination of Enemy Character

The *San Remo Manual* codifies the customary rules for determining if a merchant vessel possesses enemy character and thus entitles the opposing belligerent to take certain measures against it. Flying the enemy's flag is conclusive evidence of a vessel's enemy character,⁷⁴ while flying a neutral flag is only prima facie evidence of its neutral character.⁷⁵ Enemy character can be determined by registration, ownership, charter, or other criteria,⁷⁶ including evidence of illegal or fraudulent transfer to a neutral flag.⁷⁷ With regard to cargo, although not stated in the *San Remo Manual*, the principle of "free ship, free goods" laid down in the 1856 Paris Declaration is maintained.⁷⁸

Visit and Search of Merchant Vessels

Similarly, the *San Remo Manual* states the modern rules regulating a belligerent's right to visit and search a merchant vessel reasonably suspected to be subject to capture when it is outside neutral waters,⁷⁹ or alternatively to divert it, with its consent, from its declared destination.⁸⁰ Merchant ships under convoy of neutral warships can be exempt from visit and search if the traditional conditions are met,⁸¹ although as a matter of progressive development the right to form multinational convoys is accepted.⁸² On the other hand, neutral merchant vessels under the convoy of an enemy warship are subject to the same treatment as enemy merchant ships.⁸³ The *San Remo Manual* also clarifies the rules for supervision of cargo through "navicerts" or other certification procedures.⁸⁴

Capture and Destruction of Enemy Vessels and Goods

Enemy vessels of any category (irrespective of their destination and the nature of the cargo) and their cargo are liable to capture if not specially protected.⁸⁵ Of the many categories of enemy vessels now exempt from capture,⁸⁶ Hague Convention No. XI listed only two: coastal fishing vessels and vessels charged with religious, scientific, or philanthropic missions.⁸⁷ The longer list in the *San Remo Manual* reflects twentieth-century developments in treaty and customary law (e.g., hospital ships and vessels given safe conduct by agreement of the parties).⁸⁸ However, the stated exemption from capture is not absolute. The *Manual*

⁷⁴ SAN REMO MANUAL, *supra* note 3, para. 112.

⁷⁵ *Id.*, para. 113. The Helsinki Principles, *supra* note 5, para. 5.1.2, do not address this question.

⁷⁶ SAN REMO MANUAL, *supra* note 3, para. 117.

⁷⁷ See Explanation, *supra* note 3, para. 117.3.

⁷⁸ For the provisions of the Paris Declaration, see text at note 16 *supra*. See also Explanation, *supra* note 3, para. 117.8; accord COMMANDER'S HANDBOOK NWP 1-14M, *supra* note 26, para. 7.4.1.2.1.

⁷⁹ SAN REMO MANUAL, *supra* note 3, para. 118; accord Helsinki Principles, *supra* note 5, para. 5.2.1; ANNOTATED SUPPLEMENT, *supra* note 26, para. 7.6 & n.105.

⁸⁰ SAN REMO MANUAL, *supra* note 3, paras. 119, 121; accord Helsinki Principles, *supra* note 5, para. 5.2.1. The General Editor of the *San Remo Manual* quite properly notes that the possibility of diversion, in lieu of visit and search, of a neutral merchant vessel is progressive development of the law. Doswald-Beck, *supra* note 3, at 202.

⁸¹ SAN REMO MANUAL, *supra* note 3, para. 120. The customary law rules were stated in the 1909 London Declaration, *supra* note 17, Arts. 61, 62.

⁸² *Id.*, para. 120(b); see Explanation, *supra* note 3, para. 120.4.

⁸³ See Explanation, *supra* note 3, para. 120.3.

⁸⁴ SAN REMO MANUAL, *supra* note 3, paras. 122-24; accord Helsinki Principles, *supra* note 5, para. 5.2.6.

⁸⁵ See Explanation, *supra* note 3, para. 135.1.

⁸⁶ SAN REMO MANUAL, *supra* note 3, para. 136. Compare the somewhat longer list of categories of vessels exempted from attack set out in *id.*, para. 67.

⁸⁷ Hague Convention No. XI, *supra* note 3, Art. 3.

⁸⁸ See Explanation, *supra* note 3, para. 136.

indicates that an enemy vessel is exempt only if it is innocently employed in its normal trade, does not commit acts harmful to the enemy, submits immediately to identification and inspection when so required, does not intentionally hamper the movement of combatants, and obeys orders to stop or move out of the way.⁸⁹

The circumstances under which captured enemy vessels may be destroyed, in lieu of being subject to adjudication as prize following capture, or diversion, have been controversial.⁹⁰ Notwithstanding contrary state practice, the *San Remo Manual* takes the position that destruction should be “an exceptional measure,” taken only when the safety of the passenger and crew is provided for, documents and papers relating to the prize are safeguarded, and, if feasible, the personal effects of the passengers and crew are saved.⁹¹ The *Manual* for the first time states the customary rule that prohibits the destruction of enemy passenger vessels carrying *only* civilian passengers.⁹²

Capture and Destruction of Neutral Merchant Vessels and Goods

The *San Remo Manual* restates the traditional rules permitting capture of a neutral merchant vessel outside neutral waters when the ship is engaged in activities inconsistent with its neutrality, such as carrying contraband or breaching a blockade.⁹³ The *Manual* also restates the customary rules permitting the destruction of captured neutral merchant vessels as an exceptional measure.⁹⁴

V. PROTECTED PERSONS AND MEDICAL TRANSPORTS

Protected Persons

Protections for certain categories of persons at sea were introduced in the Additional Articles of 1868.⁹⁵ Current treaty law, however, does not comprehensively identify which persons at sea should be entitled to protected status. The *San Remo Manual* seeks to clarify the situation. It provides that “[m]embers of the crews of rescue craft may not be captured while engaging in rescue operations”;⁹⁶ that persons on board other vessels exempt from capture⁹⁷ may not be captured;⁹⁸ and that crew members of auxiliary vessels who are nationals of an enemy state are entitled to be, and may be, made prisoners of war if captured,⁹⁹ as may crew members of neutral merchant vessels that have taken a direct part in the hostilities on the side of the enemy or have served as an auxiliary for the enemy.¹⁰⁰ The *Manual* adds provisions on the treatment to be given to various categories of nationals of a neutral state on enemy and neutral ships.¹⁰¹

⁸⁹ SAN REMO MANUAL, *supra* note 3, para. 137.

⁹⁰ See the various views set out in TARGETING ENEMY MERCHANT SHIPPING, *supra* note 52.

⁹¹ SAN REMO MANUAL, *supra* note 3, para. 139.

⁹² *Id.*, para. 140.

⁹³ *Id.*, paras. 146–50; accord Helsinki Principles, *supra* note 5, paras. 5.2.2–5.2.5.

⁹⁴ SAN REMO MANUAL, *supra* note 3, paras. 151–52.

⁹⁵ Additional Articles, *supra* note 13, Arts. 7, 8, 11.

⁹⁶ SAN REMO MANUAL, *supra* note 3, para. 162.

⁹⁷ *Id.*, paras. 136, 142.

⁹⁸ *Id.*, para. 163.

⁹⁹ *Id.*, para. 165(c).

¹⁰⁰ *Id.*, para. 165(e).

¹⁰¹ *Id.*, para. 166.

Medical Transports

The protection of medical transports also originated in the Additional Articles of 1868.¹⁰² The rules set forth in the Second Geneva Convention of 1949 and Additional Protocol I of 1977 are for the most part satisfactory. However, the provisions regarding notification, means of defense, and communications could be improved along the lines suggested in the *San Remo Manual*.

The Convention requires that the notification contain the name of the hospital ship, its registered gross tonnage, its length, and the number of masts and funnels. The *Manual* suggests that the following additional information be included in the notification:

- the call sign or other recognized means of identification of the hospital ship;
- radio frequencies guarded and languages used;
- whether the hospital ship is accompanied by other medical transports, e.g., helicopters;
- whether it is equipped with means of defence; and
- the position of the hospital ship, its intended route and estimated time en route and of departure and arrival as appropriate.¹⁰³

While Article 35 of the Second Geneva Convention provides that the crews of hospital ships may be armed in their own defense or in defense of the sick and wounded, the Convention does not address possible means of defense of the ships themselves. The *San Remo Manual* wisely suggests that hospital ships may be equipped with “purely deflective means of defence, such as chaff and flares,”¹⁰⁴ which might be used to defend against incoming cruise missiles.

Article 35(2) of the Second Convention authorizes hospital ships to carry and employ communications equipment necessary for their movement and navigation. On the other hand, the English text of Article 34(2) provides that “hospital ships may not possess or use a secret code for their wireless or other means of communication.” This text appears to imply a prohibition on possession and use for both *sending* and *receiving* encrypted communications. However, the equally authentic Spanish and French texts of this article prohibit only the *sending* (“pour leurs émissions”) of encrypted traffic.¹⁰⁵ Further, technology has changed since 1949; all messages to and from warships, including unclassified messages, are now automatically encrypted when sent and decrypted when received by communications equipment that includes the crypto function. As the Explanation to the *San Remo Manual* argues, “Hospital ships, therefore, should have the same type of communication equipment to avoid delays in receiving vital information caused by having separate and outdated radio equipment that does not have the integral crypto function.”¹⁰⁶ The *Manual* thus suggests: “In order to fulfil most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military ad-

¹⁰² Additional Articles, *supra* note 13, Arts. 6, 9, 10, 12, 13.

¹⁰³ Explanation, *supra* note 3, para. 169.6. Resolution 7 of the 1949 Diplomatic Conference of Geneva expressed the hope that all high contracting parties “will arrange that, whenever conveniently practicable, such ships shall frequently and regularly broadcast particulars of their position, route and speed.” 1 [SWISS] FEDERAL POLITICAL DEP’T, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 362 (n.d.). The regulations concerning identification contained in Annex I to Additional Protocol I, *supra* note 11, as amended on November 30, 1993 (entered into force Mar. 1, 1994), provide for some of these improvements. See INT’L REV. RED CROSS, NO. 298, Jan.–Feb. 1994, at 29–41; ICRC, MANUAL FOR THE USE OF TECHNICAL MEANS OF IDENTIFICATION BY HOSPITAL SHIPS, COASTAL RESCUE CRAFT, OTHER PROTECTED CRAFT AND MEDICAL AIRCRAFT (1990).

¹⁰⁴ SAN REMO MANUAL, *supra* note 3, para. 170.

¹⁰⁵ See ICRC, Memorandum, *Revision of Annex I to Protocol I*, INT’L REV. RED CROSS, NO. 232, Jan.–Feb. 1983, at 26.

¹⁰⁶ Explanation, *supra* note 3, para. 171.3.

vantage.”¹⁰⁷ The latter possibility could be minimized by permitting a qualified neutral observer to be on board to check on the proper use of this equipment.¹⁰⁸

Red Cross Box

The *San Remo Manual* also recommends a new provision that builds on the agreement between the United Kingdom and Argentina during the South Atlantic conflict in 1982 by which they established a “Red Cross box” at sea with a diameter of about 20 nautical miles.¹⁰⁹ This box enabled the safe exchange of British and Argentine wounded. The *Manual* would permit the parties to the conflict to agree between themselves, “for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.”¹¹⁰ The Second Geneva Convention contains no such provision.

VI. THE TWENTY-FIRST CENTURY

The progressive development of the few subjects identified in this article as worthy of it can be achieved through state practice. Unlike the other measures suggested in the *Manual*, however, adaptation of the Second Geneva Convention’s provisions on radio communications may require some more formal procedure, such as an amendment to the Convention. However, as the Convention does not provide for either amendments or meetings of the high contracting parties, adoption of such an amendment might require the convening of a diplomatic conference whose subject matter might well not be limited to that issue; this may be an unlikely prospect. On the other hand, amendment of the Second Convention might be effected through the as-yet-untried amendment process of Additional Protocol I, involving consideration by a conference of parties to the Protocol and the 1949 Conventions of a proposal submitted by any party to the Protocol.¹¹¹

The question also arises whether a full-scale revision of the treaties on the law of naval warfare should be undertaken, or whether that law should just continue to develop in the twenty-first century as customary international law. A decade ago, one scholar called for new treaties.¹¹² The participants in the San Remo project felt it was premature to think in terms of a draft treaty.¹¹³ More recently, another distinguished professor wrote that “the case for a major revision of the law of naval warfare remains a strong one.” However, he cautioned that

any attempt to address this issue by means of an international conference would present considerable difficulties and would be doomed to fail unless it had the active support of the major naval States. In the circumstances, the personal view of the Rapporteur is that revision of the law of naval warfare, although desirable in the longer term, should not be considered an immediate priority. Instead, international efforts should be directed towards the further refinement of the customary law, using the *San Remo* statement as a starting point, and attempts to improve compliance with that law.¹¹⁴

¹⁰⁷ SAN REMO MANUAL, *supra* note 3, para. 171. How to achieve a legal basis for this change in the text of the Second Convention is addressed at the end of this article.

¹⁰⁸ Observers are provided for in Article 31(4) of Geneva Convention No. II, *supra* note 10. Such observers, of course, must be able to tell if the equipment is being misused.

¹⁰⁹ See SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF ARMED CONFLICT: FALKLAND–MALVINAS ISLANDS (1982), at 26, para. 3.1.3 (1984).

¹¹⁰ SAN REMO MANUAL, *supra* note 3, para. 160.

¹¹¹ Additional Protocol I, *supra* note 11, Arts. 7, 97. See NEW RULES FOR VICTIMS OF ARMED CONFLICTS 84–87, 557–58 (Michael Bothe, Karl Josef Partsch & Waldemar A. Solf eds., 1982).

¹¹² Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in THE LAW OF NAVAL WARFARE 1 (Natalino Ronzitti ed., 1988).

¹¹³ See Doswald-Beck, *supra* note 3, at 207.

¹¹⁴ Christopher Greenwood, *International Humanitarian Law (Laws of War): Revised report prepared for the Centennial of the First International Peace Conference pursuant to United Nations General Assembly Resolutions A/RES/52/154 and A/RES/53/99*, at 51, para. 4-48 (May 1999) <http://minbuza.nl/English/f_sumnews14.html>.

At about the same time, the governments of the Netherlands and the Russian Federation reached a similar conclusion:

The law of naval warfare as stated in the Conventions of 1907 being largely outdated, a full-scale revision of this body of law may be called for. The so-called 1995 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* provides a starting point for such revision. A diplomatic conference on the subject should, however, only be convened after further thorough preparation and with the active support of major naval powers.¹¹⁵

This author agrees that any attempt to convene a diplomatic conference to revise the law of naval warfare should not be undertaken without the active support and participation of the major naval powers. After all, they would bring experience and reality to the proceedings, and would have a direct interest in the process and substance and in ensuring an acceptable outcome.

History does not suggest that this would be a fruitful exercise. One need only recall the failed efforts in Washington in 1921–1922 to achieve lasting naval disarmament after World War I, and later in London in 1930 and 1936 to deal with unrestricted submarine warfare against merchant ships.¹¹⁶ The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which was held in Geneva from 1974 to 1977 and drafted the two Additional Protocols to the 1949 Geneva Conventions, decided not to address the rules of international law applicable to war at sea.¹¹⁷

Any diplomatic conference to revise the laws of naval warfare would presumably be open to representatives from all nations and nongovernmental organizations, most of which do not have significant interests at stake. Of the more than 150 coastal states, only a small fraction have a significant naval capacity or experience with naval warfare. Another 30 states are landlocked. Consequently, unless the rules of procedure of such a conference provided for all decisions, particularly on matters of substance, to be taken by consensus, or unless the conference could be limited to significant naval powers, those states without significant interests at stake would probably have the votes to decide matters of importance to naval powers without their consent.

For these reasons, this author does not share the view that full-scale revision of the law of naval warfare needs to be, or even should be, undertaken with a view to the development and adoption of one or more new treaties. As recounted above, development and improvement of the law of naval warfare have occurred more rapidly and progressively through the active creation and revision of manuals reflecting the acceptable practice of states in war at sea.¹¹⁸ Law of war treaties are written in light of, and to correct, the abuses of past wars, and the universality of their acceptance is always chancy. Reliance on practice limits those with an impact on the development of the law of naval warfare to those with significant interests at stake.

¹¹⁵ Kingdom of the Netherlands and Russian Federation, *Outcome of the Celebrations of the Centennial of the First International Peace Conference: Report on the conclusions of the expert meetings on the three "Hague themes", Peace Palace, The Hague, 17–18 May 1999 and Smolny Institute, St. Petersburg, 22–25 June 1999*, para. 73, at 16 <http://minbuza.nl/English/f_sumnews14.html> (visited Dec. 14, 1999).

¹¹⁶ See U.S. NAVAL WAR COLLEGE, *STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS* 36–47 (International Law Studies No. 58, W. T. Mallison, Jr., ed., 1968).

¹¹⁷ See NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note 111, at 290–91; Additional Protocol I, *supra* note 11, Art. 49(3).

¹¹⁸ See W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in *THE LAW OF NAVAL OPERATIONS*, *supra* note 26, at 1.